Supreme Court, U.S.
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96 - 10 MAY 15 1996

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CASE NO. 95-

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

IN THE MATTER OF
CLDC MANAGEMENT CORPORATION
[APPEAL OF CLARENCE O. GESCHKE
AND IRENE M. GESCHKE]

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Court of Appeals condoned attorney conflict of interest and defendants' interference with petitioners' legal counsel.

(2) Whether the Court of Appeals condoned the district court's extreme delay in bringing this case to trial and its repeated failure to report the case pursuant to the requirements of 28 U.S.C. Chapter 23 §§ 471 *et seq*. The Civil Justice Reform Act.

(3) Whether the Court of Appeals departed from controlling decisions by this Court that jury instructions and special verdict forms must present essential issues of fact raised by the pleadings and by the evidence.

(4) Whether the Court of Appeals' decision affirming the district court's exclusion of evidence is in accord with controlling decisions by this Court.

PARTIES TO THE PROCEEDING

The parties to the appeal 94-3586 to the United States Court of Appeals for the Seventh Circuit were: plaintiffs CLARENCE O. GESCHKE and IRENE M. GESCHKE, and defendants LASALLE NATIONAL BANCORP, LASALLE NATIONAL BANK, UNION REALTY MORTGAGE COMPANY, INC., CLDC MANAGEMENT CORPORATION, RUSSELL R. CUSTER, DENNIS KAPLAN, JAMES A. CAMPION, as Trustee under Trust Deed No. 766087, and CHICAGO TITLE & TRUST COMPANY.*

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*LaSalle National Bancorp, a bank holding company originally named Central National Chicago Corporation, later changed its name to Exchange International Corporation, then to Exchange Bancorp, Inc., and finally to LaSalle National Bancorp, Inc.

LaSalle Bancorp's wholly owned subsidiary, LaSalle National Bank, originally named Central National Bank, was renamed Exchange National Bank before adopting its present name.

This petition will refer to LaSalle National Bancorp as "LaSalle Bancorp," and to LaSalle National Bank as "LaSalle Bank."

This petition will refer to Union Realty Mortgage Company, Inc., LaSalle Bancorp's wholly owned subsidiary and LaSalle Bank's sister corporation, as "Union."

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OPINIONS AND ORDERS ENTERED

The district court entered final judgment on September 22, 1994. A panel of the United States Court of Appeals for the Seventh Circuit issued its decision on January 5, 1996, which is reported at 72 F.3d 1347 (7th Cir. 1996). (2a-17a, 31a-32a)[1]

STATEMENT OF BASIS FOR JURISDICTION

The Seventh Circuit on February 15, 1996 denied the Geschkes' petition for rehearing with suggestion for rehearing en banc. (18a) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) "Courts of appeals; certiorari . . ."

STATUTES, RULES AND REGULATIONS

The case for which review is sought involves 18 U.S.C. Chapter 63, §§ 1341 et seq.; 18 U.S.C. Chapter 96, §§ 1961 et seq.; 28 U.S.C. Chapter 23 §§ 471 et seq.; Rules of the United States District Court for the Northern District of Illinois, "Rules of Professional Conduct", Rule 1.7; Illinois Supreme Court Rules, Article VIII, Rule 1.7. Those provisions are set out in this petition's appendix. (21a-30a)

STATEMENT OF THE CASE

I. DEFENDANTS' INTERFERENCE WITH GESCHKES' LEGAL COUNSEL, CONFLICT OF INTEREST, AND DELAY IN TRIAL OF CASE

Nature Of Case 79 B 40657

Case 79 B 40657 is a civil action that bears the number of a bankruptcy case that was dismissed in 1985; a civil case

[1] Pages in the attached appendix are cited: "(pg. no.)a".

number has never been assigned to the case. The Complaint in case 79 B 40657 includes counts alleging fraud, violations of all four subsections of § 1962 of the Racketeer Influenced And Corrupt Organizations Act (RICO), 28 U.S.C. §§ 1961 et seq., breach of contract, breach of fiduciary duty, negligent supervision, negligent misrepresentation and breach of covenant of good faith. The counts all relate to three loans made to the Geschkes by defendant Union.

Procedural History

Case 79 B 40657 was filed in 1979. It was assigned to District Court Judge John F. Grady in April 1983. The district court first scheduled the trial of the case to begin on May 5, 1988, but later vacated that date. The Geschkes' legal counsel were permitted to withdraw in July 1988, without having taken the case to trial. The Geschkes unsuccessfully attempted to retain new legal counsel on a contingent-fee basis, which was the only way they could afford counsel, and so began representing themselves in March 1989.

The Court of Appeals for the Seventh Circuit in March 1992 reversed a summary judgment entered in October 1990 in favor of defendant LaSalle Bancorp. (appeal no.91-1944) After further proceedings, the case finally went to trial in August 1994. Following the jury's verdict in September 1994, and the district court's entry of final judgment for all defendants on all counts, the Geschkes filed their appeal no. 94-3586.

Defendant LaSalle Bank's Retention Of Geschkes' Legal Counsel, And Resulting Conflict Of Interest

The law firm Vedder, Price, Kaufmann & Kammholz ("Vedder Price") in February 1984 committed to represent the Geschkes in case 79 B 40657, on a contingent-fee basis. Shortly thereafter, the firm told the Geschkes that its services had been solicited by defendant LaSalle Bank .

(then named Exchange Bank). The firm obtained the Geschkes' reluctant consent to simultaneously represent them and the bank. The firm obtained no written waiver from the Geschkes. It told them that its employment by the bank would be of only limited duration. However, the firm's employment by LaSalle Bank was not of limited duration but continued throughout the firm's representation of the Geschkes and after the firm withdrew as their legal counsel. (R.559 Exhibit C; R.645-2 pp.64-67, 95-97, 113-115; R.645-3 pp.146-150)[2]

Thomas L. O'Brien, the Vedder Price attorney who had accepted the Geschkes' case and had been approached by the bank, said he would not participate in the case but would turn it over to another lawyer in the firm, Allan E. Lapidus. (R.559 Exhibit C) But later the Geschkes learned that O'Brien had not distanced himself from their case: in July 1988 Lapidus told the district court that O'Brien "has been participating with me in the case since day one." (R.141-3 p. 18)

In June 1988, Vedder Price threatened to withdraw from the case unless the Geschkes gave it sole authority, in writing, to settle it : the firm did not state what amount it would accept as a settlement. The Geschkes refused. Vedder Price was at that time representing defendants Union; its sister corporation, LaSalle (Exchange) Bank; and its parent corporation, LaSalle (Exchange) Bancorp. (R.642-2 p.95-97; R.645-3 pp.146-150)

At the hearing on July 13, 1988, the Geschkes told the district court that Vedder Price had moved to withdraw because it was engaged in a conflict of interest. (R.141-3 pp.16-17) Of the six Vedder Price lawyers, and the lawyers for the defendants, who were present at the hearing, none disputed the existence of the conflict of interest. The

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[2] The docket number assigned to each paper filed with the district court clerk is cited as "R.(no.)".

district court brushed the matter aside and made no further inquiry.

Before granting Vedder Price's motion at that hearing to withdraw, the district court stated:

> "I know what is going to happen is that they [the Geschkes] are going to scour the countryside to find somebody willing to take this on a contingent fee and will be unable to do so." (R.141-3 pp.5-6)

The district court advised the Geschkes at the February 8, 1989 hearing that "Under the best of circumstances you are going to have difficulty getting a lawyer." (R.141-7 p.9)

Neither Vedder Price nor any of the defendants have ever denied that they engaged in a deliberate conflict of interest. (R.255-3 pp.2-8; R.319-4 pp.3-8; R.552 pp.3-4; R.559 p.4, Exhibit C; R.645-3 pp.19-26)

The district court denied the Geschkes' motions for the district court to order Vedder Price and/or the defendants to fund the cost of legal counsel the Geschkes would retain on an hourly-fee basis. (R.233, 393) None of the defendants denied assertions in those motions that their actions and those of Vedder Price had deprived the Geschkes of representation by legal counsel. (R.255-3 pp.2-8; 319-4 pp.3-8)

II. JURY INSTRUCTIONS AND SPECIAL VERDICT FORMS

Court Ordered Case To Be Tried In "Phases"

The district court divided the trial into "phases." In the first phase, the Geschkes were to present all their evidence concerning their claims against all the defendants except LaSalle Bancorp, which was to be tried in the second phase. The trial never reached the second phase. (R.567, order attached to April 20, 1994 minute order; R.645-5 p.4)

The Geschkes objected that their claims against LaSalle Bancorp were intertwined with those against the

other defendants. (R.565 pp.3-8) The Geschkes attached as part of their objection a document, titled Facts And Supporting Exhibits That Show Liability Of Defendant LaSalle National Bancorp In Case 79 B 40657, that cites evidence that LaSalle Bancorp was aware of, acquiesced to, and participated in the scheme to defraud.

And the court had previously stated that evidence of awareness or participation in the wrongdoing by LaSalle Bancorp would entangle the issues of Union's liability and that of LaSalle Bancorp. (R.511-2 pp.24-25)

At the commencement of the trial on August 15, 1994, the court also excluded LaSalle Bank as a defendant in the trial's phase one. The court ordered the Geschkes to only present evidence that related to their claims against four of the defendants: Union and its officers Russell Custer and Dennis Kaplan, and CLDC. (R.645-5 p.4) The court reminded the Geschkes during trial not to present any evidence relating to LaSalle Bancorp and LaSalle Bank. (R.645-7 p.518; R.645-8 p.582; R.645-9 p.805; 645-12 pp.1064-1065)

The Geschkes' Complaint alleges that LaSalle Bank and Union "functioned as a continuing unit with a common purpose, structure, personnel and bond," and that the bank "conspired with and participated in the fraudulent acts" of the other defendants. (R.121 pp.18-19, 30)

The Seventh Circuit's opinion in appeal no. 91-1944 notes evidence of LaSalle Bank's and LaSalle Bancorp's participation in the wrongdoing described in the Geschkes' Complaint. (R.291 pp.7-11)

On September 15, 1994, eight days after the trial's phase one was completed, the court stated that the Geschkes' claims against LaSalle Bank were concluded because they had not presented any evidence at trial to support their claims against the bank, and that " I do know there is no evidence of fraud on the part of Central National Bank (i.e., LaSalle Bank)." (R.661-1 pp.1317-1318)

Court Denies Motion To Amend Complaint

The district court denied in 1989 the Geschkes' motion for leave to amend their Complaint . The court stated that at trial they could amend their Complaint to conform to the evidence presented at trial. (R.118 fn.15 p.16)

The court initially advised during the trial that the Geschkes should not "worry about your Complaint" because "it is very often necessary to tailor the charge to the jury in terms of the evidence that's actually received." (R.645-8 pp.581-582)

But later at trial the court denied the Geschkes' motion (R.636) to amend their Complaint to conform to the evidence. (R.642; R.645-12 pp.1066-1067)

Court Submits Case To Jury By Special Verdicts

At the hearing on September 16, 1994, the district court handed the parties the special verdict forms and jury instructions that it had prepared. (R.656, R.659, R.660, R.661, R. 662, R.663, R.664) The court refused the parties' proposed special verdict forms and instructions. The Geschkes objected to the court's instructions and special verdict forms. (R.651, R.668-1 pp.1348-1386)

The Geschkes on September 19, 1994 filed and presented to the court their objections to the special verdict forms and jury instructions the court had prepared, and their demand to the court to amend those forms and instructions. The objections and demand were presented prior to the court's instructing the jury. The court denied the objections and demand, except that it did agree to a minor change. (R.651; R.668-2 pp.1396-1397)

The court conceded that some of its jury instructions were incomplete, but that "any lack of completeness in [the trial's] Phase 1 can be made up in Phase 2, if we reach that stage." The trial never reached phase 2. (R.668-1 p.1367)

The special verdict forms the court submitted to the jury only name, as defendants, Union, Custer, and Kaplan — and one Jack Organ, even though he had died in 1987 and the court had then dismissed him as a defendant. But the verdict forms do not name CLDC as a defendant, even though the Geschkes had complied with the court's order for them to present in the trial's first phase their evidence concerning their claims against CLDC. (R.645-5 p.4; R.645-8 pp.744-767; R.645-13 pp.1214-1244)

Fraud

The Seventh Circuit confirmed in its decision (17a) that the district court's instructions and special verdict forms only ask the jury to find whether defendants Union, Custer and Kaplan, and Organ (a non-defendant), had participated in a scheme to defraud the Geschkes out of their racquetball club property.

The court's instruction for "scheme to defraud" (R. 656 no. 31) misstates that the Geschkes allege that the scheme was executed only through the defendants' fraudulent misrepresentations to them about Organ and the cost to construct the racquetball club. The court stated that the special verdict form did not "contemplate the issue of reliance" and "proximate cause" but that the court would get back to those issues if the jury found in the Geschkes' favor. (R668-1 p.1360)

The instruction excludes the defendants' numerous other alleged misrepresentations, breaches of contract, fraudulent use of the mails, and other actions, all comprising the scheme to defraud the Geschkes out of all three of their properties that secured Union's three loans.

The Geschkes objected that the court had omitted from its instructions for the scheme to defraud issues of fact raised by the pleadings and evidence, and that its corresponding special verdict form did not ask the jury to make a finding on those material facts. (R.651; R.668-2 p.1396)

The Geschkes' pleadings and the evidence they present-

ed at trial describe a scheme to defraud that the defendants carried out over several years and that consisted of multiple acts directed at the Geschkes' three projects financed by Union. That evidence shows that the defendants concealed Organ's criminal record at the time they recommended that the Geschkes hire him as general contractor of those three projects: the jury found that Organ had knowingly understated the cost of constructing the racquetball club, to make it appear that it could be completed for the amount of Union's construction loans. (R.645-6 pp.231-234, 247-250, 280-291, 310-327; R.645-7 pp.473-476, 481-482, 484-486, 553-554, 564-565; R.645-8 pp.623-629; R.645-9 pp.1000-1004)

Other evidence at trial shows that Union gave Organ unauthorized access to funds in the Geschkes' loans (R.645-13 pp.1102-1147), then cut off funds from the two construction loans, arguing that the loans were insufficient to pay for the buildings' completion. (R.645-6 pp.291-295, 303-308, 337; R.645-7 pp.496-501; R.645-8 pp.707-709; R.645-13 pp.1144-1146, 1189-1194) Custer testified that Union should have asked the Geschkes for the additional money Union would need to cover that insufficiency, instead of just cutting off the loan funds. (R.645-309)

The evidence at trial shows that at the same time Union cut off loan funds, it also blocked the sale of five of the lots securing its third loan to the Geschkes by refusing to release the lots from the loan (Union's three loans were not cross-collateralized); Union's actions caused the Geschkes to default on their three loans from Union, paving the way for Union to foreclose on the loans; the defendants coerced the Geschkes, in lieu of foreclosure, to sell their three projects securing Union's loans, to CLDC, whose president was the business partner of Union's chairman and CEO; the defendants, including CLDC, conspired to deprive the Geschkes of proceeds they were to receive from the sale of their three projects to CLDC. (R.645-5 pp.150-164; R.645-6 pp.181-358; R.645-7 pp.422-568; R.645-8

pp.584-769; R.645-9 pp.976-1012; R.645-13 pp.1087-1243)

The court had observed at trial that:

"There is already evidence today from Mrs. Geschke that there was $90,000 sitting out there on these five lots that could have been used to pay off the racquetball club court.

"The jury heard that. And Union unreasonably refused to release those lots. You can't stick your head in the sand and pretend as though there is only one project involved in this case." (R.645-8 p.720)

The court stated prior to trial that Union treated its three loans to the Geschkes "as all the same ball of wax, and to try to put blinders on the jury and try the case as though all that was involved was the racquetball club seems to me not to be realistic." (R.209-14 p.24)

The court had expressed "substantial misgivings" that excluding the Geschkes' claims involving Union's other two loans would lead to "injustice" to the Geschkes. (R.209-12 pp.4-5)

On September 16, 1994, nine days after both sides rested their case, the defendants presented to the court their motion for judgment as a matter of law. (R.646) They argued that their representations to the Geschkes about Organ were not "actionable" as fraudulent misrepresentation because they were "statements of opinion."

The court disagreed:

"Illinois Courts have repeatedly said that . . . where the statements as to future events or statements of opinion are part of a fraudulent scheme, then the fact that they do not relate to existing facts as opposed to future events or matters of opinion does not prevent their being actionable. . . This is such a case, at least as far as the plaintiffs' allegations and plaintiffs' evidence is concerned." (R.668-1 p.1290)

During its deliberations, the jury on September 20, 1994 asked to be instructed on what constitutes a false representa-

tion. Despite the court's ruling only four days earlier that a false representation relating to a future fraudulent scheme is actionable, the court instructed the jury to the contrary. The court told the jury that a false representation is "... a statement which is known to be false at the time it is made, not found out to be inaccurate or false at some time later." (R.668-3 pp.1572-1573)

The Geschkes presented on September 22, 1994 a motion (R.657) for the court to supplement its answer to the jury's question on September 20, 1994 by instructing the jury that fraud may be inferred from all of the circumstances preceding and attending the scheme to defraud because direct evidence seldom exists. The court denied the motion. (R. 668-4 p. 1591; R. 658)

Racketeer Influenced And Corrupt Organizations Act

The district court ordered that all the Geschkes' claims against defendants Union, Custer, Kaplan and CLDC were to be tried in the first phase of the trial. Those claims included the claim that the defendants had violated all four subsections of § 1962 of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") by using the United States postal service to carry out a scheme to defraud. (R.121 pp.13-21; R.645-5 p.4)

The Geschkes requested the court to permit them, in the trial's first phase, to introduce evidence pertaining to LaSalle Bank and LaSalle Bancorp, to prove the enterprise element of their RICO claim. The court reminded the Geschkes not to present in the trial's first phase, any evidence involving LaSalle Bancorp and LaSalle Bank, including evidence relating to the RICO claims. (R.645-8 pp.579-582)

But on September 16, 1994, eight days after the Geschkes had concluded their case, the court stated:

> "Your evidence is all in on the RICO claim. All we do is take a look at whether you have proved the necessary elements on the basis of the evidence that is already in,

and I have not addressed that." (R.661-1 p.1353)

The court had stated that "the predicate acts in the RICO counts are acts of mail fraud in the execution of the same scheme set forth in the common law claim." (R.45 p.12; R.645-12 p.1064)

The Geschkes put into evidence at the first phase of the trial twenty-one mailings to establish that the four defendants used the mails over a period of more than two years to carry out the scheme to defraud, in violation of 18 U.S.C. § 1341. (R.645-5 pp.150, 162-63; R.645-6 pp.217, 235, 242, 351, 354, 356; R.645-7 pp.510-511; R.645-8 pp.746, 747, 759, 761, 763; R.645-13 pp.1192, 1219, 1226)

The court ordered the Geschkes not to argue their RICO claims in their closing argument, and did not submit to the jury instructions and special verdict forms covering the RICO claims. The court stated that "At the RICO stage of the case, if we reach that, I will consider the plaintiffs' RICO instructions." The trial never reached the "RICO stage." (R.668-1 pp.1385, 1388)

Breach Of Contract

The jury instructions and special verdict forms for breach of contract that the district court prepared and submitted to the jury omit and significantly misstate the Geschkes' claims; present as undisputed fact Union's reasons for cutting off loan funds; and ignore issues of fact raised by the pleadings and evidence.

The Geschkes drew to the court's attention at the September 16, 1994 hearing those issues of fact relating to the defendants' breach of contract that were not included in the court's jury instructions and special verdict form. (R.668-1 pp.1296-1314, 1373-1379)

The Geschkes presented evidence at trial that the defendants, as part of the scheme to defraud, breached Union's contracts governing its three loans to the Geschkes by: 1) shortening the period allowed for making payments of only

interest on the loans; 2) failing to obtain copies of all contracts for material, labor and services, to ensure that the two construction loans were sufficient to complete the projects securing those loans; 3) failing to reserve loan funds for the payment of interest on the loans; 4) delaying the disbursement of funds from the loans; 5) paying out loan funds without first obtaining payout authorizations from the Geschkes; 6) cutting off funds from the two construction loans, and refusing to release lots that secured the third loan. (R.645-6 pp.197-202, 245-258, 267, 276, 279-309, 337, 342-346; 645-7 pp.398-402, 433-448, 488-500; 645-8 pp.636-638, 649-654, 707-709, 733-735; 645-13 pp.1101-1152, 1243-1280)

Breach Of Duty Of Good Faith

The district court did not submit to the jury instructions and a special verdict form for the claim that the defendants breached their duty of good faith to the Geschkes. The court did not do so even though it had noted at trial evidence that the defendants had "unreasonably refused" to release five lots from Union's loan on the Geschkes' housing development project, preventing the Geschkes from realizing $90,000 in sale proceeds that they could have "used to pay off" the racquetball club loan. (R.645-8 pp.720-721)

Breach Of Fiduciary Duty

As with its instructions and special verdict forms for scheme to defraud, the district court did not include the elements of "reliance" and "proximate cause" in its instructions and special verdict form for breach of fiduciary duty. The court stated that the special verdict form it prepared and submitted to the jury

> "merely asks whether the fiduciary relationship existed and whether Union violate (sic) it. It doesn't say anything about damages. And therefore, there is no need to talk about proximate cause." (R.668-1

pp.1356-1366)

The Geschkes objected that the court's instruction and verdict form for fiduciary duty omitted issues of fact raised by the pleadings and evidence, including that they were damaged as a result of the defendants' concealment of Organ's criminal background at the time they recommended that the Geschkes hire him. (R.651)

Entry Of Final Judgment

The district court entered a final judgment (31a-32a) in favor of all the defendants following the jury's verdict in favor of only three of them. The jury only found against the deceased Jack Organ, whom the court had dismissed as a defendant seven years before the trial: the jury found that Organ had falsely represented that the amount of one of Union's loans was enough to complete the construction of one of the Geschkes' projects. (R.660)

The jury's verdict was rendered on only six of the Geschkes' fifteen counts against the defendants: The jury rendered no verdict on the Geschkes' counts alleging RICO violations and mail fraud, breach of good faith, and fraudulent conveyance of Union's assets. The jury did not render a verdict on any of the Geschkes' claims against defendants LaSalle Bancorp and LaSalle Bank, who were excluded from the first phase of the trial.

III. EXCLUSION OF EVIDENCE

The district court held three hearings in 1994 (R.686, 645-2, 645-3) to rule on the defendants' objections to exhibits the Geschkes proposed to use at the trial. (R.580) The Geschkes, in their response to the objections and at the hearings, argued that the exhibits in question were necessary to prove the facts relevant to their claims against the defendants. (R.591) The court ruled to exclude from evidence 142 of the Geschkes' 290 exhibits. The court told the Geschkes that they could just testify at the trial instead of offering exhibits.

because the jury could take notes. (R. 645-3 pp.62, 129, 131; R. 645-8 pp. 615-616)

The court excluded from evidence the Geschkes' exhibit concerning Jack Organ's criminal record: a Certified Statement of Conviction from the Clerk of the Circuit Court of Cook County, and a Criminal History Report from the City of Chicago Police Department. That exhibit documented Organ's guilty plea in 1968 to charges of theft and forgery of 39 checks totaling $469,309 from construction projects, and his subsequent imprisonment. The court said it would reserve its ruling on the exhibit until it heard evidence at the trial as to Union's knowledge of Organ's criminality. (R.686 p.19) Union employees Kaplan and Custer both testified at trial that they knew about Organ's criminal conviction but did not share that information with the Geschkes when recommending Organ to them. Yet the court, without explanation, declined to admit the exhibit into evidence. (R.645-6 pp.280-291; R.645-7 pp.473-476, 481-486, 553-568; 645-8 pp.623-631; R.668-1 p.1392)

Among the Geschkes' exhibits that the court did admit into evidence was a handwritten note recording that shortly after Union cut off funds from its loans to the Geschkes, Kaplan and Organ attempted to receive a real estate commission from the sale of the racquetball club. The note states that at a meeting attended by Organ and Marvin Reynolds, Union's president and senior vice president of Central National Bank (now LaSalle Bank), Dennis Kaplan's father expressed concern about his son's getting his share of that commission. (R.645-2 p.7; R.645-7 pp.512-515; R.645-8 pp.590-591)

Reynolds in his May 1988 deposition said that that handwriting was his. The court granted the defendants' motion to bar that deposition transcript from evidence, over the Geschkes' objections. (R.616, 612) Dennis Kaplan at trial stated that he had introduced to the Geschkes two prospective buyers for the club; but he later denied that he was to receive

any commission from its sale. (R.645-7 pp.505, 511)

The proposed sales contract for the club (which the Geschkes rejected) specifying that Organ is to receive a commission was another of the Geschkes' exhibits that the court excluded. The court stated that the exhibit would only confuse the jury. But at the trial's conclusion, the court told the Geschkes that in their closing argument, "you can't say that Mr. Kaplan was going to receive a commission because there was no evidence that he was." (R.668-1 pp.1338-1339; R.645-2 pp.7-14)

The court excluded other exhibits documenting: a) Organ's theft of large amounts of materials from the Geschkes' three projects financed by Union; b) that Organ and Kaplan (who was one of Union's loan officers) were business partners in real estate ventures; c) that Organ was the general contractor of the Geschkes' three properties. (R.686 pp. 72-76, 78-79)

The court excluded the Geschkes' exhibits that documented that the defendants interfered with the Geschkes' representation by the Vedder Price law firm. The court stated that Vedder Price was not a defendant, and those exhibits showed nothing more than a conflict of interest and did not prove claims against the defendants. The excluded exhibits included: a) the letter from Vedder Price to the Geschkes in which the firm threatens to withdraw as counsel unless the Geschkes give it sole authority to settle their lawsuit against the defendants; b) the article in the *Chicago Daily Law Bulletin* in which a Vedder Price attorney admits that the firm represented LaSalle Bank the entire time it represented the Geschkes against the bank and the other defendants; c) documents that establish that at the time Vedder Price was representing the Geschkes the firm was also representing Exchange (LaSalle) Bancorp, Exchange (LaSalle) Bank and Union. (R.645-2 p.66,95-97,113-115; R.645-3 pp.146-150)

The court at discovery hearings in 1993 ruled that the defendants had destroyed documents that the Seventh Circuit had found the defendants should have preserved. (R.291 p.11

fn.16; R.511-1 pp.59-61; R.580; R.591 p.10; R.617 p.8) But in August 1994, the court outlined an involved, multi-step procedure that the Geschkes would have to go through at trial before they could give the jury evidence of the defendants' nonproduction of documents. (R.645-3 pp.3-4, 9-10, 14-17, 27-30; R.645-6 pp.177, 179; R.645-8 p.625)

Before concluding their case, the Geschkes on September 6, 1994 presented their offer of exhibits for admission into evidence. (R.638) The Geschkes' offer set forth specific reasons why the offered exhibits were vital to proving their claims against the defendants. The court declined to consider the offer:

> ". . . because it would require the Court to go over the list of exhibits and compare it to pretrial rulings, compare it to the exhibits which have been received in evidence and those which have been excluded, and there is no need for the Court to be put to that burden at this time."

(R.642; R.645-12 pp.1067-1068)

The defendants filed on September 13, 1994 a "motion to clarify" that asked the court not to send in with the jury 50 of the Geschkes' exhibits that were excluded at pretrial hearings but had been testified to or introduced at trial, or had been admitted into evidence but not "referred to in any testimony." The Geschkes' response identified the witnesses who had testified to those exhibits at trial. The court granted the motion. (R.650; R.653; R.654; R.668-1 pp.1331-1348)

Of the Geschkes' original 290 trial exhibits, only 61 were admitted into evidence and furnished to the jury. (R.677) Of those 61 exhibits, 19 served only to prove the accuracy of figures on a contractors statement.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS HAVE CONDONED CONFLICT OF INTEREST AND INTERFERENCE WITH COUNSEL, THEREBY DEPARTING FROM

ACCEPTED AND USUAL PRACTICE TO A DEGREE THAT MERITS THIS COURT'S SUPERVISION

Before deciding issues the Geschkes raised on appeal, the Seventh Circuit considered, as a threshold issue, whether the Geschkes' case had merit, and found that it had none. (3a-13a)

But the Seventh Circuit's statement of the legal claims, facts and merits of the case is contrary to the record,[3] a situation not lacking precedent.[4]

The case's history does not support the Seventh Circuit's finding as to the merits. And if the case really lacked merit, the defendants would have attempted to obtain summary judgment rather than litigating the case for fifteen years.

The Seventh Circuit made two subsidiary findings

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[3] A few examples must suffice. Contrary to the Seventh Circuit (4a-13a), the case involved not just one but all three of Union's loans to the Geschkes. (R.119 pp.1-8; R.645-1 pp.13-16; R.645-8 pp.635-636, 720-721; R.209-14 pp.4-5, 22-24); the case record does show that Organ was in charge of all three of the Geschkes' projects financed by Union (R.638 pp.10, 15); Union's CEO and Chairman, Fredric Gale, was in fact a business partner of CLDC's sole shareholder, one Richard Izdebski, to whom Union forced the Geschkes to sell the projects (R.645-13 pp.1228-1332); Union did in fact delay paying out funds from the racquetball club until shortly before Union required the club to be completed. (R.645-6 p.344; R.645-8 p.650)

[4] Cf. *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1270-1280 (7th Cir. 1983) [Coffey, J., dissenting (p.1279): "The majority paints a totally inaccurate picture which once again is without support in the record."]; *Matter Of Scarlata*, 979 F.2d 521, 528-539 (7th Cir. 1992) (Coffey, J., dissenting).

(3a- 5a) that in 1988 and thereafter no lawyer would represent the Geschkes in this case because it had no merit, and that despite the lack of merit the Geschkes chose to act as their own lawyers and prosecute the case.

The Seventh Circuit's assertion (4a) that 28 law firms reviewed the case and found it "unworthy of acceptance" is wrong — none questioned its merit — and is not supported by anything in the record.

The Seventh Circuit did not in its decision address why the Geschkes' lawyers (Vedder Price) withdrew in 1988, when the case was in its ninth year without having been tried. But the Seventh Circuit was well aware of the conflict of interest.

At oral argument in appeal no. 94-3586, Chief Judge Posner specifically asked Mrs. Geschke why Vedder Price withdrew as the Geschkes' counsel. She responded by relating the defendants' interference and the conflict of interest. The defendants' lead counsel, Stephen B. Diamond, in his oral argument, did not in any way refute the interference and conflict of interest, which were not addressed by Judge Posner or by the other two judges on the panel.

And previously, LaSalle Bank's retention of the Geschkes' legal counsel, and the conflict of interest in which counsel engaged, had been related in the Geschkes' opening brief (pp.5-7) in their appeal no. 91-1944 of the summary judgment the district court had entered in LaSalle Bancorp's favor.

The defendants' interference with the Geschkes' former legal counsel, and the ensuing conflict of interest, were not raised as an issue in appeal 94-3586 because the district court had repeatedly held that conduct to be irrelevant to the case. (R.119 pp.2, 11, 18; R.232; R.233; R.319-4 pp.3-8; R.393; R.645-2 p.95; R.645-3 pp.38, 146-150, 175-177, 182-184; R.642-5 pp.64-66, 95-97, 113-115) The case record discloses that the interference and conflict of interest remained an issue throughout the case.

The lower courts would however have been well aware of the magnitude of intentional conflict of interest and of a party's interference with an opposing party's legal counsel. Third party interference with the contractual relationship between an attorney and a client is unlawful. *Corpus Juris Secundum "Attorney & Client"* § 144(a).

Conflicts of interest are prohibited by Illinois Supreme Court Rules, Article VIII "Illinois Rules of Professional Conduct" and by the "Rules of Professional Conduct" in the Rules of the United States District Court for the Northern District of Illinois. Both have a Rule 1.7 "Conflict Of Interest; General Rule." (21a) "An attorney's violation of conflict-of-interest rules gives rise to a high probability that the trial may be tainted . . ." *SK Handtool Corp. v. Dresser Industries, Inc.*, 246 Ill.App.3d 979, 989, 619 N.E.2d 1282 , 1283, 1289 (Ill.App. 1 Dist. 1993).

"A client's consent to multiple representation does not automatically justify a lawyer's maintenance of employment." *Clay v. Doherty*, 608 F.Supp. 295, 296, 302 (D.C.Ill. 1985) Clients have to be fully informed of the situation and must give their full consent. *Lavaja v. Carter*, 153 Ill.App.3d 317, 318, 326, 505 N.E.2d 694, 695, 700, appeal denied 116 Ill.2d 560, 515 N.E.2d 110 (Ill.App. 2 Dist. 1987). Vedder Price did not explain the ramifications of its going to work for LaSalle Bank, and falsely represented that it would not be entering into a long-term relationship with LaSalle Bank and LaSalle Bancorp.

The prohibition against conflicts of interest applies "when an opponent of the client in an ongoing matter retains the lawyer to represent him in an unrelated matter, e.g., *In re Hansen*, 586 P.2d 413, 414 (Utah 1978) (accepting employment from client's opponent in a civil proceeding to defend opponent in criminal matter) . . ." *ABA/BNA Lawyers' Manual On Professional Conduct* 51:103. "The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging

fraud entails conflict [of interest] to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation." *ABA/BNA Lawyers' Manual On Professional Conduct,* 1:119. The Geschkes' Complaint included counts alleging fraud and RICO violations. (28a-30a)

The apparent possibility that a conflict of interest exists imposes a duty on the trial court to inquire further. *Wood v. Georgia,* 450 U.S. 261, 272-274, 67 L.Ed.2d 220, 230-231, 101 S.Ct. 1097 (1981) Yet the district court denied that it had any such duty and made no inquiry into an acknowledged conflict of interest. (R.255-4 pp.3,5,7-8)

The conflict of interest involving Vedder Price and the principal defendants deprived the Geschkes of the assistance of legal counsel. They were left with no choice but to represent themselves or cease prosecuting their case.

The accepted and usual course of judicial proceedings excludes conflict of interest and interference with an opposing party's representation by legal counsel. The Seventh Circuit in its decision ignored departures from accepted and usual judicial proceedings. Those departures merit review by this Court to determine whether the trial of the case was tainted and a new one must be ordered.

II. WHETHER FEDERAL COURTS MAY PRACTICE EXTREME DELAY AND DISREGARD 28 U.S.C. CHAPTER 23, THE CIVIL JUSTICE REFORM ACT, IS A SUBSTANTIAL ISSUE THIS COURT SHOULD ADDRESS

After deploring the antiquity of the Geschkes' case (2a-3a), the Seventh Circuit faults them for prosecuting the case for fifteen years even though, according to the Seventh Circuit, it lacked any merit. (3a-13a) The Circuit states that if the Geschkes had retained legal counsel, counsel would have advised them that the case lacked merit. (3a-4a) Those erroneous findings have been rebutted in the foregoing

Reason I.

The fact that a meritorious case dragged on for so long implies a question that the Seventh Circuit ignores: How could a federal district court have failed to bring a case to trial until nearly fifteen years had elapsed?

Back in 1991, the delay inflicted on this case was brought to the Seventh Circuit's attention in the Geschkes' opening brief (pp.2-4) in their appeal no. 91-1944 of the summary judgment the district court entered in LaSalle Bancorp's favor. And in May 1993, the Geschkes petitioned the Seventh Circuit for a writ of mandamus to Judge Grady to bring their case to trial; the petition was denied.

The Seventh Circuit's apparent lack of concern over the delay dissuaded the Geschkes from making delay an issue in their appeal of the final judgment entered in 1994.

But then, the Seventh Circuit found that the delay was attributable to the Geschkes' choosing to litigate as plaintiffs *pro se*. (3a-6a) The Geschkes' *Petition For Rehearing* (pp.1-2) demonstrated that they had vigorously attempted to move their case to trial. They noted that their case was never reported to the Director of the Administrative Office of the United States Courts, as required by 28 U.S.C., Chapter 23, §§ 471 *et seq.*, The Civil Justice Reform Act of 1990. [hereinafter "CJRA"]. (22a-26a) (R.559 Exhibit C: "After 15 years in court, suburban duo still awaiting trial on suit alleging fraud by lender", *Chicago Law Bulletin,* p. 1, February 24, 1994.) The petition for rehearing was denied without comment. (18a)

The CJRA was enacted to promote dissemination among federal courts of techniques to meet the need to improve litigation management and reduce litigation cost and delay, thereby benefiting the public. Congressional Statement of Findings, Section 102 of Pub.L. 101-650 (4)(6), CJRA §§ 471, 475, 479. The United States District Court for the Northern District of Illinois implemented its CJRA plan in

November 1993, pursuant to CJRA §§ 471, 473. (22a-26a)

If district courts do not comply with the CJRA, and cooperate in implementing it, the anticipated public benefit will not be realized.

The district court's management of this case raises questions: How much time must pass before a district court's failure to bring a case to trial becomes an abuse of discretion? Does CJRA §§ 476 and 481 create a legal obligation on district courts to report to the Administrative Office of the United States Courts the number and name of all civil cases that have not been terminated within three years after filing?

Those questions were effectively before the Seventh Circuit, which however ignored and thereby condoned the delay and the district court's failure to report the case to the Administrative Office.

Federal district courts have a responsibility to timely adjudicate cases and maintain current calendars. *Colonial Penn Life Insurance Co. v. Assured Enterprises, Ltd.,* 151 F.R.D. 91 (N.D.Ill. 1993); *Marshall v. Gates,* 812 F.Supp. 1050, reversed 44 F.3d 722, as amended (E.D.Cal. 1993). Litigants must not be "unduly penalized" by having their cases go untried: Civil Justice Reform Act Advisory Group of the United States District Court for the Northern District of Illinois, *Preliminary Report* (1993), page 36.

Federal courts have inherent power to control their dockets and calendars, to conserve the resources of the court, counsel, and litigants. CJS "Federal Civil Procedure" § 933; *Landis v. North American Company,* 299 U.S. 248, 254, 81 L.Ed. 153, 158, 57 S.Ct. · 163. (1936)

The Advisory Group's *Preliminary Report* observes (p.21) that "The CJRA seems to contemplate eighteen months as the maximum reasonable time within which a case should be brought to trial." [citing 28 U.S.C. § 473 (a) (2) (B)] The *Report* (p.22) states: "At some point in every case, all will agree that the elapsed time has

become unreasonable. But except in the more extreme cases, that point eludes prediction or agreement." The *Report* also states (p.29) that lawyers in the district may "believe that two years is as long as almost any case should take."

This is one of those "extreme cases." The district court's delay in bringing this case to trial was unreasonable. It is far beyond any range of an acceptable period of time permitted for trying a case.

The Seventh Circuit condoned departures in the underlying case from accepted and usual judicial proceedings, which exclude protracted and extraordinary delay, and non-compliance with the CJRA. Those departures merit exercise of this Court's supervisory power.

III. THE SEVENTH CIRCUIT HAS DECIDED ISSUES IN A WAY THAT SO DEPARTS FROM CONTROLLING DECISIONS OF THIS COURT AS TO MERIT REVIEW

Jury Instructions

The foregoing Statement Of The Case presents facts demonstrating prejudicial error by the district court in its formulation and submission of jury instructions and special verdict forms.

This Court has long held that a trial court must accurately and completely instruct the jury as to the issues and applicable law in a case, and that failure to so instruct is an abuse of discretion. *Douglass & Mandeville v. M'Allister,* 7 U.S. 298 (1806), 3 Cranch 298, 2 L.Ed. 445, affirming *M'Allister v. Douglass,* Fed. Case No. 8657, 1 Cranch, C.C. 241; *Greenleaf v. Birth,* 34 U.S. 292, 9 Pet. 292, 9 L.Ed. 132 (1835). (Pet.Rehear. pp.12, 15)

And in the Seventh Circuit "Failure to give an instruction where merited effectively directs the verdict for the opposing party on a disputed issue." *Cameo Convalescent Center, Inc. v. Senn,* 738 F.2d 836, 841 (7th Cir. 1984), cert.

denied 469 U.S. 1106. (Pet Rehear. pp.1, 13, 14)

The court's instructions and verdict forms erroneously defined the scheme to defraud as consisting a single issue carrid out solely by misrepresentations. The Seventh Circuit confirms that those instructions and verdict forms limited the jury's deliberations to a single issue: whether three of the defendants conspired to underfinance one of three projects encompassed in the scheme to defraud. (17a)

But as demonstrated in the foregoing Statement Of The Case, the scheme to defraud that the Geschkes presented consisted of much more, including many actions and omissions involving many more defendants and involving not one but rather three loans Union made, one for each of the Geschkes' three projects. The court's own statements indicate that it understood that the scheme to defraud included many issues involving all three of Union's loans to the Geschkes, and therefore that the court was aware that the instructions and verdict forms it prepared and submitted were incomplete. And the Seventh Circuit confirmed (16a) that the Geschkes' case "involved a multi-count complaint with significant overlap among the counts, the various legal theories, and the facts relevant to those counts and theories."

The court erred in excluding the elements ot "reliance" and "proximate cause" from its instructions and verdict forms because evidence showed that the Geschkes' relied on the false representations of the defendants, and that they were injured as a result.

The court erred in instructing that a representation is not false if it is only later found to be false, while failing to instruct that concealing a material fact or remaining silent despite having a duty to speak is actionable for fraud. *State Security Insurance Co. v. Frank B. Hall & Co.*, 258 Ill.App.3d 588, 591-592, 630 N.E.2d 940, 943-944 (Ill.App. 1 Dist. 1994); *United States v. Biesiadecki*, 933 F.2d 539, 543 (7th Cir. 1991); *United States v. Holzer*, 816

F.2d 304, 307 (7th Cir. 1987).

The court did not instruct that opinion is actionable if part of a scheme to defraud, even though the defendants had argued at trial that opinions were not actionable. But the district court itself had observed that Illinois courts have repeatedly held that statements and opinions may be actionable if they are part of a scheme to defraud: *General Motors Acceptance Corp. v. Central National Bank of Mattoon*, 773 F.2d 771, 779-780 (7th Cir. 1985). And misrepresentations as to future events are actionable for fraud: *Dawson v. W. & H. Voortman, Ltd.*, 853 F.Supp. 1038, 1040, 1045 (N.D.Ill. 1994); *General Motors Acceptance Corp. v. Central National Bank of Mattoon*, 773 F.2d at 779-780.

The court did not define what conduct may be fraudulent, and refused to instruct that fraud may, of necessity, be inferred from all circumstances shown by evidence: *Ronan v. Rittmueller*, 205 Ill.App.3d 200, 206, 434 N.E.2d 38, 42-43 (Ill.App. 2 Dist. 1982); *Connolly v. Gishwiller et al.*, 162 F.2d 428, 433-434 (7th Cir. 1947)

Fraud may consist not only of verbal misrepresentations but also of actions and omissions. *State Security Insurance Co. v. Frank B. Hall & Co.*, 258 Ill.App.3d 588, 591-592, 630 N.E.2d 940, 943-944 (Ill.App. 1 Dist. 1994); *Gibbons v. Brandt*, 170 F.2d 385, 391 (7th Cir. 1947.)

The court, through its instructions and verdict forms, engaged in wholesale exclusion of issues raised by the Geschkes' Complaint, other pleadings and evidence at trail. Thus, the Seventh Circuit's finding (16a) that the court "clearly used the Geschkes' complaint as a basis for framing the issues presented to the jury" is clearly wrong.

The court's instructions and verdict forms blocked the jury from rendering verdicts on all issues of fact raised by the actions and omissions that were central to the entire scheme to defraud as alleged in the Geschkes' Complaint and other pleadings, and as proved at trial.

As for the Geschkes' claims under 28 U.S.C. chapter 96

Racketeer Influenced And Corrupt Organizations §§ 1961 et seq., those claims alleged a scheme to defraud "by acts, practices and courses of conduct" (Complaint, Count II par. 41) including violations of 18 U.S.C. chapter 63 Mail Fraud § 1341 "Frauds and swindles" (27a-30a). That scheme to defraud and those acts of mail fraud were all alleged in the Geschkes' pleadings and were supported by evidence presented at the trial.

The court never submitted to the jury the issues of whether the defendants engaged in the many actions and omissions that comprised the scheme to defraud, or committed predicate acts of mail fraud: thus, there were no jury findings to support the judgment the court entered in favor of all the defendants on all of the Geschkes' claims. The Seventh Circuit did not address issues the Geschkes raised concerning the court's disposition of those claims.

The court further erred when it entered judgment in favor of all the defendants (including LaSalle Bank and LaSalle Bancorp) following the jury's verdict in favor of only three defendants and on only six of the fifteen counts. The court had barred presentation at trial of any evidence concerning LaSalle Bank and LaSalle Bancorp.

Contrary to the Seventh Circuit (16a), the Geschkes took issue with the court's instructions and verdict forms for all their claims included in the trial's phase one, not just with those covering the scheme to defraud.

The court was aware of the inaccuracy and lack of completeness of its instructions and verdict forms: the Geschkes filed proposed jury instructions with citations to model instructions or applicable law, noted at hearings the instructions' deficiencies, and filed their objections.

The Geschkes through the objections they filed drew the court's attention to the deficiencies of its jury instructions and special verdict form before they were submitted to the jury.

Juries must follow instructions and special verdict forms they receive from the court, and courts assume juries do so. *Pomer v. Schoolman,* 875 F.2d 1262, 1267 [7th Cir. (Ill.) 1989]. The jury in the Geschkes' case could only apply the law to those facts included in the instructions and special verdict forms the district court prepared. It should be noted that the Seventh Circuit perceives that the Geschkes challenged the court's use of special verdict forms. (16a) But nowhere in their briefs is the court's right to use verdict forms made an issue.

The court's jury instructions and special verdict forms were prejudicially incomplete and inaccurate, and therefore misleading, and were at variance with case law.

"Where the general effect of the charge must have been misleading, the judgment will be reversed." *Hall v. Weare,* 92 U.S. 500 (1876). In cases concerning fraud, the Supreme Court reversed a judgment because the trial court's instructions were misleading as to the facts and theories of the case. *Hall v. Weare*, 92 U.S. at 501; *Thorwegan v. King,* 111 U.S. 514 , 516 (1883).

The Seventh Circuit's findings conflict with its own case law and with this Court's decisions. The Seventh Circuit's decision to sanction the court's substantial abuse of discretion is itself error that merits review by this Court.

EXCLUSION OF EVIDENCE

The foregoing Statement Of The Case presents facts demonstrating prejudicial error by the district court in its rulings to exclude the Geschkes' evidence.

Evidence of Organ's conviction for theft and forgery is relevant to the Geschkes' allegations that Union, Kaplan and Custer had breached their fiduciary duty by recommending Organ but not disclosing his criminal past. That caused the Geschkes to put Organ in a position of trust and responsibility, enabling him to further the scheme to defraud them.

The evidence of Organ's conviction also relates directly to the issue of whether Organ forged signatures on documents to gain access to funds from Union's loans to the Geschkes. Yet the Seventh Circuit, compounding the lower court's error, classifies Organ's conviction as only being among "collateral and inflammatory matters" in the case. (12a)

Evidence of the business relationship between Kaplan and Organ undermines Kaplan's claim not to have known any details of Organ's criminal past when he recommended him, and helps show fraudulent misrepresentation and breach of fiduciary duty.

Evidence of the defendants' destruction of documents, which the Seventh Circuit found should have been preserved and produced, would allow the jury to decide whether to draw appropriately adverse inferences as to the defendants.

Spoliation or suppression of evidence will cause all things to be presumed against the despoiler. *Hanson et al. v. The Lessee Of Eustace*, 43 U.S. 653, 708, 11 L.Ed. 416, 438 (1844). The jury should be informed of a party's failure to produce relevant evidence. *Johnson v. Washington Metropolitan Area Transit Authority*, 764 F.Supp. 1568, 1579-1580 (D.C. Cir. 1991)

Finally, the evidence of the defendants' retention of the Geschkes' legal counsel, and inducement of counsel to engage in a conflict of interest, is relevant as demonstrating a continuation and expansion of the scheme to defraud.

"In actions for fraud, large latitude is given to the admission of evidence." *Butler v. Watkins*, 80 U.S. 456, 464, 20 L.Ed. 629, 630 (1871). Cases of fraud clearly necessitate admission of evidence of other related circumstances that combine to shed light on the matters at issue in a case. *Wood v. United States*, 41 U.S. (16 Pet.) 341,360-361, 10 L.Ed. 987, 994-995 (1842).

The Seventh Circuit states that it "combed the record" looking for error in excluding evidence but found none. (15a) But the trial court's prejudicial exclusion of clearly relevant evidence deprived the Geschkes of their substantial right to fully and fairly present their case to the jury, to such a degree as to merit exercise of this Court's supervisory authority.

CONCLUSION

For the reasons stated herein, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: January 5, 1996

BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable HARLINGTON WOOD, Jr., Circuit Judge
Honorable TERENCE T. EVANS, Circuit Judge

No. 94-3586

IN THE MATTER OF: CLDC MANAGEMENT CORPORATION, Debtor

APPEAL OF: IRENE M. GESCHKE and CLARENCE O. GESCHKE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 79 B 40657, John F. Grady, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 94-3586
In the Matter of
CLDC Management Corporation,

Debtor,

Appeal of: IRENE M. GESCHKE and CLARENCE O. GESCHKE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 79 B 40657 [80 A 28, 80 A 103, 80 A 277]-
John F. Grady, Judge

ARGUED DECEMBER 6, 1995-DECIDED JANUARY 5, 1996

Before POSNER, *Chief Judge*, and H. WOOD, JR. and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge*. The underlying facts in this dispute began to emerge during the administration of President Ford in 1976. The lawsuit was filed during the Carter administration in 1979. Discovery consumed the two terms of the Reagan administration. During the Bush administration, the district court granted a defense motion for summary judgment which we reversed less than a year before the start of the Clinton administration. The case was finally tried to a jury for about two weeks in 1994, and it is here now, for the second time, ready for our review. Our decision today will, we hope, put the case to rest before the next administration takes office in Washington. **[Pg.2]** During its visit here, in 1992, we noted that the case "had a confused and complex procedural history." We also

noted that the Geschkes "have been litigating [the case] on a *pro se* basis since July 1988, when their previous counsel withdrew." We told the Geschkes in 1992 that this case was complex, noting that it "involved a search of numerous records, a task ill-suited to litigants with no legal background."

In 1992, Irene Geschke (who successfully argued the summary judgment decision) told us she and her husband had tried to find legal counsel to represent their interests on a contingent fee basis-she said they talked with 28 different law firms-but to no avail. We closed our 1992 decision by noting, "It appears to the court that the appellants would be well advised to continue their efforts to secure legal counsel."

The Geschkes did not engage a lawyer to represent them after we sent the case back to the district court in 1992. During the 1994 trial, Irene Geschke functioned, so to speak, as lead counsel. Now that the jury has not seen the case the Geschkes' way, they are back here again on appeal, with Irene orally arguing the Geschke position. We asked, during argument, if she tried to engage counsel prior to the trial, and she said yes, but that the attempts were unsuccessful.

With examples like Patrick Henry, John Marshall, and Abraham Lincoln, we know that one does not, necessarily, have to go to law school to be a good lawyer. But it helps. Although we believe the Geschkes, particularly Irene, have done a fine job presenting this case, the primary shortcoming here is that they have not received sage and unemotional advice about the merits of their case by someone not directly embroiled in the proceedings. One of the real dangers in representing yourself is that you sometimes get to believe that your case is better than it actually is. That appears to be the situation here. That the

Geschkes think their case is stronger than it is may be seen in their attempts to obtain counsel prior to the **[Pg.3]** first appeal. We know, and we hope the Geschkes know, that attorneys are generally more than willing to take up cases on a contingent fee basis if they have a fair chance of winning. When 28 lawyers turn a case down, that should be an indication that it is swimming upstream. Either all the lawyers who reviewed the case and found it unworthy of acceptance are wrong, or the Geschkes are wrong in believing that the case has worth. The bookmakers in Las Vegas would know whom to put their money on in this disagreement.

So we are now poised to issue a decision on the Geschkes' appeal, and because the jury found in favor of the defendants, we are required to view the facts in the light most favorable to them. The facts that we will report, then, may not necessarily be what the Geschkes view the facts to be, but that is one of the rules we are obligated to follow in a case that reaches us in this posture. And so we turn now to a review of the facts, going, perhaps, into more detail than we would if the Geschkes were represented by counsel.

In 1976 the Geschkes decided to build a racquetball club in Woodstock, Illinois. They developed plans for the project and reviewed them with two architects before hiring one of them to take charge of the project. They also retained a certified public accountant to conduct a feasibility study of the plan.

After their initial spadework, the Geschkes began to look for financing. They discussed the costs of construction and financing with two banks, then met with Dennis Kaplan, a mortgage loan representative employed by Union Realty Mortgage Co., Inc. Kaplan reviewed the Geschkes' projections of cash flow from the project to determine what sort of mortgage could be

issued. Based on this review, Kaplan determined the property would support a debt of $350,000, and the Geschkes applied for a construction loan with Union in that amount plus an additional $25,000.

[Pg.4] One month after they submitted the loan application, the Geschkes received a written estimate from their architect that it would cost $489,000 to build the club, $114,000 more than the requested $375,000 loan. A few days after the Geschkes received the architect's cost estimate, they entered into a contract with him to prepare construction drawings.

Union conducted an appraisal while it processed the Geschke loan application. Union's appraiser estimated that it would cost $478,000 to build the club, a sum close to the estimate provided by the Geschkes' architect. Relying on personal financial statements submitted by the Geschkes which showed their net worth to be $1 million, Union agreed to make the $375,000 loan.

The loan commitment was issued by Russell Custer, an officer of Union. Custer made a preliminary commitment for the loan in February 1977, followed by a more comprehensive commitment in May 1977. The loan agreement was ultimately executed in July of 1977. The agreement noted that the loan would only "defray a portion of the cost of constructing" the club. As conditions of the loan commitment, the Geschkes were required to complete construction by December 1, 1977, keep the property free of mechanic's liens, and provide satisfactory evidence that the cost of construction had been paid to the extent that the proceeds of the construction loan would be sufficient to pay for the completion of the project.

Just as they have acted as their own counsel for much

of this case, the Geschkes chose to act as their own general contractor on the job. They did, however, decide to hire a supervisor to work under their direction. The Geschkes interviewed several possible candidates for the construction supervisor post, including their architect. Ultimately, they hired Jack Organ, whom they met earlier through Mr. Kaplan. Organ's capabilities were know to Union because he had successfully completed other construction projects which Union had financed. Custer and Kaplan thought Organ was competent based on their **[Pg.5]** observations of his work for others and the work he did for Union.

As a condition of the racquetball club loan, payouts would not begin until the Geschkes submitted a sworn contractor's statement itemizing the cost of the project. Irene Geschke submitted a sworn contractor's statement to Union (why it was accepted from a noncontractor is not clear and not important) on October 12, 1977. The statement, signed by Irene Geschke, showed costs to be $453,000. Payouts began a few days after Union received the sworn statement.

Meanwhile, the foundation for the racquetball club had been poured during the spring and summer of 1977, after which the work was stopped due to a delay in the delivery of precast concrete panels to be used for the construction of the club. In August the Geschkes - who then had a lawyer - wrote the precast supplier threatening to terminate the contract and file suit if it did not immediately deliver the panels.

Because of the delays in the precast panel deliveries, the Geschkes did not complete the project by December 1, 1977, the deadline called for in their agreement with Union. From December 1977 through June 1978, the

Geschkes attempted to devise a plan to complete the project, but they never submitted one to Union. Subcontractors began placing mechanic's liens on the property and, after a substantial percentage of the loan had been disbursed, Irene Geschke told Union that the loan was "out of balance," meaning that the undisbursed funds were not going to be sufficient to pay the remaining costs of construction. In June 1978, Union filed a foreclosure action against the racquetball club complaining that the Geschkes were in violation of the loan agreement.

Shortly after Union filed the foreclosure suit, Mrs. Geschke found a purchaser for the project, Richard Izdebski, the owner of CLDC Management Company. In her opening statement during the 1994 trial, Mrs. Geschke told the jury that she would prove that Izdebski was a **[Pg.6]** business partner of the president of Union, Fred Gale, and that the foreclosure suit was part of a conspiracy among Union, Gale, and Izdebski to transfer the property to Izdebski. But the evidence subsequently presented, as we view it today, could instead show that Mrs. Geschke herself found Izdebski, who did not have a business connection with Gale. More on that later.

When the purchase by CLDC Management was completed, Union dismissed the foreclosure action and released the Geschkes from their $375,000 personal guarantee on the construction loan. Union made a substitute loan for $375,000 and loaned an additional $144,000 to Izdebski and CLDC Management to complete construction, which they did. The club opened, but apparently there was a shortage of racquetball players in Woodstock, as it soon sank into bankruptcy. Union, which was never repaid, lost a significant sum of money on the project.

When this lawsuit began in 1979, the complaint sought damages only for the Geschkes' racquetball club project. Once the suit was filed, the parties plunged into the sea of discovery from which they eventually emerged in 1988. In 1989, despite the fact discovery was closed, the Geschkes, by then proceeding *pro se*, sought additional documents from Union and sought to expand the suit to include a claim for losses stemming from two other projects that went south over a decade earlier. A magistrate judge held that Union had complied with the document production requests and that the Geschkes' previous counsel was satisfied with discovery. He concluded that the Geschkes were bound by counsel's decision and that discovery would remain closed. The request to add the other failed projects to the case was also rebuffed.

Later in 1989, the Geschkes asked leave to amend their complaint to add LaSalle National Bancorp, Inc. as a defendant on an alter-ego theory. The claim was that Bancorp was the alter ego of Union, which went out of business in the early 1980's because it was losing money. Leave to bring Bancorp into the case was granted when the **[Pg. 7]** Geschkes stated that its inclusion would not require additional discovery.

Cross-motions for summary judgment on the alter ego count were filed in July 1990. The district court granted Bancorp's summary judgment motion, concluding "that there are no disputed facts which, if resolved in favor of the [Geschkes], would justify piercing the corporate veil [and] holding Bancorp liable for any obligations of Union that may exist toward the [Geschkes]." The Geschkes moved for reconsideration, alleging for the first time that they were denied access to documents necessary to defeat the motion for summary judgment. They served Union and Bancorp with a 43-cate-

gory document request. Union and Bancorp filed a response with the court. The district court permitted the Geschkes to review additional documents but subsequently denied the Geschkes' motion for reconsideration.

We reversed the grant of summary judgment and directed the district court to clarify its position on discovery issues. The Geschkes then filed a new 53-category document request directed to Union and Bancorp, which they styled as a "Rule 37(a) motion to compel." Bancorp and Union filed a written response to the Geschkes' document request. To ensure that the Geschkes received all the discovery they sought after the remand, the district judge ordered Bancorp to produce "anything that is arguably relevant." The district court even ordered production of documents produced before, so that no complaint could be made by the Geschkes that information was withheld.

Bancorp subsequently produced more than 100,000 pages of documents. After reviewing the documents for only one day, the Geschkes filed a Rule 37(b) motion for a default judgment against Bancorp, claiming that none of the requested documents had been produced. Judge Grady, who we note was handling this case with exemplary patience in the district court, denied the Rule 37(b) motion as premature, pending review of all the documents. The Geschkes refused, however, to further review the docu- **[Pg. 8]** ments despite three statements by Judge Grady during a hearing on October 21, 1992, where he said:

> I am also ordering you to look at the documents that have been provided to you by the defendants.
>
> . . . .

> Mrs. Geschke, I have told you repeatedly that I will not try this case and allow you to argue on appeal that I have denied you or that the defendants have denied you relevant information.
>
> . . . .
>
> I think that the Appeals Court would probably find it an abuse of discretion for me to take this case to trial without having ascertained that their mandate of full document production has been complied with.
>
> . . . .

The Geschkes, apparently reluctantly, reviewed the documents and then filed another Rule 37(b) motion alleging non-production. They again sought a default judgement against Bancorp. In April 1993, the district court issued an order setting a hearing on the motion. The Geschkes objected to any hearing being held and filed a mandamus petition asking us to decide the Rule 37(b) motion. We denied relief on May 13, 1993. We denied the Geschkes' request for reconsideration on June 30, 1993.

At the hearing, Judge Grady accepted a defense suggestion that the focus be on five major categories of documents identified in our opinion reversing the grant of summary judgment. The district court also invited the Geschkes to select five additional categories of documents which supported their claims of discovery abuse. The Geschkes refused to participate, so the court randomly picked five categories to join the five previously selected.

The district court then held a 3-day evidentiary hearing to resolve the Geschkes' motion. The hearing produced a transcript that is 300 pages long. The district court examined the documents produced in the

various categories and heard testimony from several witnesses, including Mrs. Geschke.

[Pg.9] At the conclusion of the hearing, Judge Grady determined that Bancorp and Union had complied with the discovery requests or made good-faith objections and that Irene Geschke, who testified during the hearing, was not a credible witness. The district court stated that it was satisfied that all documents had been produced and that as to any other documents, the Geschkes' "mere suspicions that they must exist somewhere is not a sufficient predicate for sanctions." The court added that the motion was frivolous and that it had taken more time to resolve that it takes to try most cases on the merits.

Perhaps not surprisingly, the Geschkes were unhappy with Judge Grady's decision. They showed their unhappiness by filing a motion to remove him from the case. Although one would understand the temptation here to grant such a motion and pass the case to someone else - as the queen of spades is passed in a game of Hearts - Judge Grady, to his credit, denied the motion. We affirmed his decision on November 8, 1993, when the Geschkes sought a writ of mandamus in this court. And so the case was ready to move into the on-deck circle.

Judge Grady, very patiently we think, next conducted a three-day pretrial hearing to review all trial exhibits. The purpose of the hearings was to ensure an orderly presentation of evidence, to make the trial understandable to the jury, and to assist the Geschkes, as *pro se* litigants, in presenting their case. The court reviewed and ruled on the admissibility of each of the Geschkes' proposed 290 exhibits. In ruling on admissibility, Judge Grady focused on excluding irrelevant, cumulative, and nonauthenticated evidence. He determined that 148 of the Geschkes' exhibits would

be admissible during the trial.

Lastly, Judge Grady bifurcated the liability phase of the trial, with the liability of Union and the individuals to be tried first. If Union was liable, the trial would then focus on the alter-ego claim against Bancorp.

After the pretrial hearing, the stage was set for the trial. To summarize the proceedings, the Geschkes were, **[Pg.10]** or should have been, poised to prove their claim that Union, Kaplan, and Custer conspired to underfinance the construction of the racquetball club so that Union could obtain ownership of the property through foreclosure. Mr. Organ (since deceased), who we noted earlier was the Geschkes' construction supervisor, was also along for the ride, as was James Campion, the trustee for the mechanic's lienholders on the project. The asserted claims covered the gambit from misrepresentation to RICO violations to breaches of fiduciary duty and contract.

The trial, which started on August 15, 1994, didn't go too smoothly as Irene got off on the wrong foot by violating a court order to refrain from mentioning Union's lack of assets. She let the cat out of the bag on that one during her opening statement. Later in the trial, Mrs. Geschke - who testified for three days - disregarded, several times, Judge Grady's orders and put collateral and inflammatory matters before the jury. This earned her a citation for contempt of court.

Eventually the case was submitted to the jury, and it exonerated Union, Custer and Kaplan on all counts. Campion, the trustee, was excused earlier on a motion to dismiss. Mr. Organ, the jury said, did not participate in a scheme to defraud the Geschkes, but he did make two misrepresentations, neither of which, however, were

made as an agent of Union.

The Geschkes raise a smorgasbord of complaints about the trial. Before even getting to their argument, they raise 44 separate objections, including (using their own words) things like:

- Court Issues Contradictory Rulings Concerning Admission Of Evidence

- Court Excludes Evidence Concerning Defendants' Failure To Comply With Order To Produce Documents Requested By The Geschkes

- Opposing Counsel Misrepresents That Contractor's Statement Had Been Previously Furnished to Geschkes and Admitted Into Evidence

- **[Pg.11]** Court Excludes Geschkes' Charts To Which Defendants Objected, But Reserves Ruling On Geschkes' Objections To Bancorp's Charts

The Geschkes' appeal is a bit amorphous, but as best we can ascertain, their objections fall into three categories. First, they argue that Judge Grady should have concluded that the defendants failed to produce subpoenaed documents. Secondly, they challenge a number of court rulings which excluded certain, largely unspecified, evidence. Last, they complain about the jury instructions and the special verdict form employed by Judge Grady to present the case to the jury.

Our review of the record leads us to find, without any difficulty, that Judge Grady bent over backwards to assure that the Geschkes had the relevant documents they needed to present their case. The problem, it seems to us, is that the Geschkes did not really have a handle on what was material

and what was immaterial in presenting this case to the jury. Because we review findings like the ones that Judge Grady made regarding the production of documents on an abuse-of-discretion standard, we find against the Geschkes on this point. Furthermore, the Geschkes acknowledge, at page 7 of their brief, that more than 136,000 documents in 87 boxes were produced by the defendants. Given this situation, and considering the great lengths Judge Grady went through to ensure that the Geschkes got what they were entitled to, we find no error.

As with the district court's ruling on the Rule 37 matters, we review its rulings on admissibility of evidence for an abuse of discretion. *Walsh v. Emergency One, Inc.*, 26 F3d 1417, 1420 (7th Cir. 1994). No error may be predicated on the exclusion of evidence unless a substantial right of a party is affected. *See* 28 U.S.C. § 2111, F.R.E. 103(a), and Fed. R. Civ. P. 61.

The Geschkes' brief does not clearly articulate how the district court erred in its rulings on the proposed exhibits that were barred during the 3-day hearing prior to the **[Pg.12]** start of the trial. The Geschkes refer to a mass of exhibits and claim prejudice due to their exclusion, but their brief is silent regarding specifics as to what exhibits were excluded - and why they were relevant. It is next to impossible to put our fingers on just what rulings were wrong and why. We asked Mrs. Geschke during her oral argument to give us a hint, but she wouldn't do it.

Despite the waiver, considering the Geschkes' *pro se* status, we have combed the record looking for error in excluding evidence. Given the trial court's discretion and, in this case, its obligation to keep the case focused, we find no error that would cause us to undo what occurred in the trial.

Perhaps representative of the frivolousness of the Geschkes' arguments on appeal is the issue they raise regarding Mr. Organ's past. The Geschkes, over a vigorous defense objection, were permitted to put into evidence an old criminal conviction lodged against Mr. Organ. He had been convicted of forgery during the Eisenhower administration in 1958, and apparently he had another conviction for theft. Although the defendants argued that the matters should have been excluded under Rules 404(b) and 609 of the Federal Rules of Evidence, Judge Grady let the jury hear it. Also, the jury heard that Union's officers suggested Organ as a construction supervisor for the job knowing that he had been convicted of a crime years ago. In explanation, Custer and Kaplan testified that Organ's trouble with the law occurred before they met him, that they did not know the details of the matters, and that they only learned of it after he started working for Union. Because his work was excellent, they said, they would have been embarrassed to ask him about his distant criminal past.

Second, although the Geschkes complain that the court did not admit an exhibit they described as Organ's criminal record, the district court, in fact, admitted a certified statement of Organ's conviction. It did not admit other documents included in the Geschkes' proffered exhibit - a police arrest record and the indictment against Organ.

[Pg.13] Finally, because the jury found against Organ by concluding that he made two misrepresentations, the Geschkes suffered no prejudice due to any limitation on the evidence of Organ's criminal record. Nor did they suffer any prejudice in their claims against Union or Bancorp. None of that evidence related to their claim that Organ was Union's agent. Moreover, the jury was fairly and appropri-

ately instructed on the issue of whether Organ was Union's agent with regard to the various claims. The jury rejected the Geschkes' assertion that Organ was Union's agent, and we, under the facts of this case, honor that finding.

We turn last to the objections to the jury instructions and special verdict forms. We shall not tarry in dispatching both sets of objections. A trial court has wide discretion in submitting special verdicts to the jury in order to facilitate its comprehension of the issues. *United States v. $94,000 in U.S. Currency*, 2 F.3d 778, 790 (7th Cir. 1993). The submission of inadequate jury instructions requires reversal only if "it appears that the jury's comprehension of the issues was so misguided that one of the parties was prejudiced." *Walsh v. Emergency One, Inc.*, 26 F.3d 1417, 1420 (7th Cir. 1994).

The district court's use of the special verdict it fashioned here was a proper exercise of its discretion under Federal Rule of Civil Procedure 49(a) because the case involved a multi-count complaint with significant overlap among the counts, the various legal theories, and the facts relevant to those counts and theories.

Though their argument is not quite as clear as mud, the Geschkes apparently challenge the verdict and instructions because they excluded "issues of fact." This appears to relate to the Geschkes' claim that the jury was somehow not sufficiently instructed on their scheme-to-defraud theory. This argument is without merit because the district court clearly used the Geschkes' complaint as a basis for framing the issues presented to the jury.
[Pg.14] We have reviewed the verdict form and the instructions and find that they not only are not erroneous, but rather, affirmatively, that they were correct. The instructions and the verdict gave the jury a fair opportunity to view

the case two ways. Either the defendants conspired to underfinance the racquetball club project so they could seize it in foreclosure, or they did not. The Geschkes had a fair opportunity to present their case to a jury of their peers. The jury rejected their claims against the defendants here, and we think the evidence was more than sufficient to support that finding. Accordingly, the judgment of the district court is affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 15, 1996

Before

Hon. Richard A. Posner, Chief Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Terence T. Evans, Circuit Judge

No. 94-3586

IN THE MATTER OF:	) Appeal from the United
CLDC MANAGEMENT CORP.	) States District Court
	) for the Northern
Debtor,	) District of Illinois,
	) Eastern Division
APPEAL OF:	)
IRENE M. GESCHKE and	) No. 79 B 40657
CLARENCE O. GESCHKE	) John F. Grady, Judge.

ORDER

On February 2, 1996 Irene M. Geschke and Clarence O. Geschke filed, with leave of the court, an amended petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges have requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
NOTICE OF ISSUANCE OF MANDATE

DATE: February 23, 1996

TO: H. Stuart Cunningham
United States District Court
Northern District of Illinois
219 S. Dearborn Street
Chicago, IL 60604

FROM: Thomas F. Strubbe, Clerk

RE: 94-3586
CLDC Management v. Geschke, Clarence O.
79 B 40657, John F. Grady, Judge

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

[x] Original record on appeal consisting of:

ENCLOSED:	TO BE RETURNED AT LATER DATE:
[17] Volumes of pleadings	[ ]
[6] Loose pleadings	[ ]
[68] Volumes of transcripts	[ ]
[4] Volumes of exhibits	[ ]
[6] Volumes of depositions	[ ]

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

BILL OF COSTS

Date: February 23, 1996

Taxed in favor of: LaSalle National Bancorp

Appeal No. 94-3586

IN THE MATTER OF: CLDC MANAGEMENT CORPORATION, Debtor

APPEAL OF: IRENE M. GESCHKE and CLARENCE O. GESCHKE

Appellate Court No.:	94-3586 Docketed on: 11/2/94
Short Caption:	CLDC Management v. Geschke
District Court Judge:	John F. Grady
District Court No.:	79 B 40657

	Cost Of Each Item
3. Reproduction of briefs:_____	$190.00
Total	$190.00

(1077-081992)

ILLINOIS SUPREME COURT RULES, ARTICLE VIII, ILLINOIS RULES OF PROFESSIONAL CONDUCT

RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS — RULES OF PROFESSIONAL CONDUCT

[Following verbiage appears in both federal and Illinois Rules of Professional Conduct.]

Rule 1.7. Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another Client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after disclosure.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after disclosure.

(c) When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implication of the common representation and the advantages and risks involved.

28 U.S.C. Chapter 23, §§ 471 et seq. — Civil Justice Expense And Delay Reduction Plans

§ 471. Requirement for a district court civil justice expense and delay reduction plan

There shall be implemented by each United States district court, in accordance with this chapter, a civil justice expense and delay reduction plan. The plan may be a plan developed by such district court or a model plan developed by the Judicial Conference of the United States. The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.

§ 473. Content of civil justice expense and delay reduction plans

(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

(2) early and ongoing control of the pretrial process through involvement of a judicial officer in

(B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that —

(i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or

(ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;

§ 475. Periodic district court assessment

After developing or selecting a civil justice expense and delay reduction plan, each United States district court shall assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court. In performing such assessment, the court shall consult with an advisory group appointed in accordance with section 478 of this title.

§ 476. Enhancement of judicial information dissemination

(a) The Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer

(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending;

(2) the number of bench trials that have been submitted for more than six months and the name

of each case in which such trials are under submission; and

(3) the number and names of cases that have not been terminated within three years after filing.

(b) To ensure uniformity of reporting, the standards for categorization or characterization of judicial actions to be prescribed in accordance with section 481 of this title shall apply to the semi-annual report prepared under subsection (a).

§ 479. Information on litigation management and cost and delay reduction

(a) Within four years after the date of the enactment of this chapter, the Judicial Conference of the United States shall prepare a comprehensive report on all plans received pursuant to section 472(d) of this title. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding such report to the Judicial Conference during the preparation of the report. The Judicial Conference shall transmit copies of the report to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives.

(b) The Judicial Conference of the United States shall, on a continuing basis —

(1) study ways to improve litigation management and dispute resolution services in the district courts; and

(2) make recommendations to the district court on ways to improve such services.

(c)(1) The Judicial Conference of the United States shall prepare, periodically revise, and transmit to the United States district courts a Manual for Litigation Management and Cost and Delay Reduction. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding the preparation of and any subsequent revisions to the Manual.

(2) The Manual shall be developed after careful evaluation of the plans implemented under section 472 of this title, the demonstration program conducted under section 104 of the Civil Justice Reform Act of 1990, and the pilot program conducted under section 105 of the Civil Justice Reform Act of 1990.

(3) The Manual shall contain a description and analysis of the litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective by the Judicial Conference, the Director of the Federal Judicial Center, and the Director of the Adminstrative Office of the United States Courts.

§ 481 Automated case information

(a) The Director of the Administrative Office of the United States Courts shall ensure that each United States district court has the automated capability readily to retrieve information about the status of each case in such court.

(b)(1) In carrying out subsection (a), the Director shall prescribe —

(A) the information to be recorded in district court automated systems; and

(B) standards for uniform categorization or characterization of judicial actions for the purpose of recording information on judicial actions in the district court automated systems.

(2) The uniform standards prescribed under paragraph (1)(B) of this subsection shall include a definition of what constitutes a dismissal of a case and standards for measuring the period for which a motion has been pending.

(c) Each United States district court shall record information as prescribed pursuant to subsection (b) of this section.

§ 482. Definitions

As used in this chapter, the term "judicial officer" means a United States district court judge or a United States magistrate.

18 U.S.C. Chapter 63, §§ 1341 et seq., Mail Fraud

§ 1341. Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

28 U.S.C. Chapter 96, §§ 1961 et seq. — Racketeer Influenced And Corrupt Organizations

§1961. Definitions

As used in this chapter —

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . ;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Minute Order Form

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge: John F. Grady

Case Number: 79 B 40657 Date: September 22, 1994

Case Title: In re: CLDC Management Corporation

DOCKET ENTRY:

(10) xx

Judgment on the verdict of the jury is entered in favor of all counter-defendants and against the counter-plaintiffs on the fourth amended counterclaim. This cause is dismissed with prejudice to the counter-plaintiffs.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

In re: CLDC Management Corporation, Debtor

Clarence O. Geschke and Irene M. Geschke, Plaintiffs

Case Number: 79 B 40657 Date: September 22, 1994

CLDC Management Corp., Union Realty Mortgage Co. Inc., and James Campion, as Trustee, et al., Defendants

XXX Jury Verdict. This action before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

Judgment on the verdict of the jury is entered in favor of all counter-defendants and against the counter-plaintiffs on the fourth amended counterclaim. This cause is dismissed with prejudice to the counter-plaintiffs.

September 22, 1994	H. Stuart Cunningham
Date	Clerk

Supreme Court, U.S.
FILED
JUL 31 1996
OFFICE OF THE CLERK

No. 96-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

IN THE MATTER OF:
CLDC MANAGEMENT CORPORATION,

debtor,

APPEAL OF IRENE M. GESCHKE and CLARENCE O. GESCHKE

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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5 pp

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APPEAL OF IRENE M. GESCHKE and CLARENCE O. GESCHKE

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, LaSalle National Bancorp, Inc. and Union Realty Mortgage Co. Inc.,[1] respond in opposition

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[1] The parent company of respondent LaSalle National Bancorp, Inc. is LaSalle National Corporation. The respondent Union Realty Mortgage Co., Inc. is a wholly owned subsidiary of respondent LaSalle National Bancorp, Inc. LaSalle National Corporation's parent is ABN AMRO, North America, Inc. The parent of ABN AMRO, North America, Inc. is ABN AMRO Bank, N.V. LaSalle National Bank is a party to the proceedings in this case solely by virtue of its formerly having been a trustee. LaSalle National Bank is a wholly owned subsidiary of LaSalle National Bancorp, Inc.

to the Geschkes' petition for a *writ of certiorari* and state:

STATEMENT OF THE CASE

Respondents adopt the Seventh Circuit's statement of the case from its opinion affirming the judgment of the district court, and incorporate it by reference. In addition, respondents make the following corrections to petitioners' statements of fact:

- The district court never stated that the jury instructions for the first phase of the trial were incomplete; the court stated that the jury would not be instructed on any issues that did not need to be considered unless the trial reached phase two. (Pet. 6).
- The district court did not rule that a false representation relating to a future fraudulent scheme is not actionable; the court ruled that it is not fraud to make false statements believing them to be true and only learning later that they are false. (Pet. 9).
- The district court did not fail to instruct the jury on petitioners' breach-of-duty-of-good-faith claim; the district court expressly instructed the jury on that issue. (Pet. 12).
- The district court did not bar petitioners from introducing the exhibit showing Jack Organ's criminal past; the court permitted petitioners to introduce a certified statement of Organ's conviction, but excluded certain hearsay documents petitioners had stapled to the certified statement. (Pet. 13-14).
- The district court did not find during the 1993 discovery hearings or otherwise that defendants "destroyed" documents which the Seventh Circuit said they should have maintained. (Pet. 15).

ARGUMENT

1. The decision of the Seventh Circuit Court of Appeals does not raise the first two questions petitioners present for review, namely "whether the Court of Appeals condoned attorney conflict of interest and defendants' interference with petitioners' legal counsel", and "whether the Court of Appeals condoned the district court's extreme delay in bringing this case to trial and its repeated failure to report the case pursuant to the requirements of 28 U.S.C. §§ 471, Chapter 23, *et seq.* [sic]". (Pet. iii). Petitioners acknowledge that they deliberately failed to raise those issues in their appeal of the merits before the Seventh Circuit and thus those issues are waived. (Pet. 18, 21); *See*, *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

2. Nor do the first two questions presented for review implicate a drastic departure from the usual and accepted course of judicial proceedings by the courts below. The district court found that petitioners had failed to introduce any evidence of a conflict or any resulting prejudice. Likewise, petitioners—not the district court—caused the "delays" that petitioners are complaining about. Among other things, petitioners made numerous continuance requests, brought two petitions for a *writ of mandamus* before the Seventh Circuit, and petitioned this Court on a prior occasion for a *writ of certiorari*. Moreover, delay is not a ground for reversing the Seventh Circuit's decision on the merits, and petitioners do not have a right of action under the Civil Justice Reform Act of 1990. *See*, 28 U.S.C. § 471, *et seq*.

3. The third and fourth questions presented for review are based on routine procedural matters that petitioners claim the Seventh Circuit decided "in such a way

that departs from controlling decisions of this Court." (Pet. 23). Petitioners simply argue that the Seventh Circuit permitted a misapplication of the correct law by the district court, not that the Seventh Circuit or district court misstated the law. Petitioners first complain about the district court's choice of jury instructions and the decision to use special jury verdict forms. Formulation of jury instructions and the decision to use special verdict forms are within the discretion of the district court as authorized by Federal Rules of Civil Procedure 51 and 49(a). Petitioners next complain about the district court's exclusion of certain exhibits. District courts rule daily on evidentiary matters and the courts' decisions are not disturbed unless there is an abuse of discretion.

4. Petitioners fail to raise any issues of importance in their petition for a *writ of certiorari*. There was no error in either the Seventh Circuit's or district court's rulings, and thus there is no basis for invoking this Court's jurisdiction.

The petition for a *writ of certiorari* should be denied.

Respectfully submitted,

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Counsel for Respondents

(3)

Supreme Court, U.S.
FILED
AUG 15 1996
CLERK

CASE NO. 96-10

The Supreme Court of the United States

October Term 1996

IN THE MATTER OF CLDC MANAGEMENT CORPORATION [APPEAL OF CLARENCE O. GESCHKE AND IRENE M. GESCHKE]

REPLY TO BRIEF IN OPPOSITION

CLARENCE O. GESCHKE
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STATEMENT OF THE CASE

The Geschkes affirm the accuracy of their *Petition For Writ Of Certiorari* (hereinafter, "petition" or "Pet.").

Contrary to the defendants [*Respondents' Brief In Opposition* (hereinafter, "Brief") p.1], LaSalle National Bank is in fact a defendant in case 79 B 40657. (Pet. pp.5,10,13,26)

The defendants' "corrections" (Brief p.2) are unwarranted, incorrect, devoid of any supporting citations to the case record, and are rebutted as follows:

- The district court did state that its jury instructions were incomplete: "Maybe I am not being consistent in the questions that I am submitting to the jury in that some are more complete than others. I would concede that." (Pet. p.6 citing R.668-1 p.1367)

- The district court first ruled that "Illinois Courts have repeatedly said that . . . where the statements as to future events . . . are part of a fraudulent scheme, then the fact that they do not relate to existing facts as opposed to future events . . . does not prevent their being actionable. This is such a case, at least as far as the plaintiffs' allegations and plaintiffs' evidence is concerned." (Pet. p.9) But the court later instructed the jury that a false statement is one "known to be false at the time it is made, not found out to be inaccurate or false at some time later." (Pet. pp.9-11) The significance of the court's ruling and jury instruction is explained in the petition. (Pet. pp.8,12-14,24-25)

- The district court did not instruct the jury on the Geschkes' claim of a breach of duty of good faith, nor did the court allow the jury to render a verdict on that claim and the defendants fail to cite any part of the record to support their pretension that the district court "expressly instructed the jury" on that issue. (Pet. p.12)

- The district court barred certified documents disclosing the felonies with which ex-defendant John M. "Jack" Organ (d.1987) was charged and convicted, and the prison sentence he received. Those documents are clearly identified and described in the petition. (Pet. p.14,27-28) The defendants fail to explain how the documents could be "hearsay."

- Portions of the case record cited for support in the petition verify that the district court did find in 1993 that the defendants had destroyed documents that the Seventh Circuit had said should have been preserved. (Pet. pp.15-16,28)

ARGUMENT

The defendants argue that two questions the petition presents "are waived": whether the lower courts have condoned a conflict of interest and interference with legal counsel, and whether federal courts may practice extreme delay and disregard the Civil Justice Reform Act, 28 U.S.C. *§§* 471 *et seq*.

The record is absolutely clear that the facts of a conflict of interest were repeatedly drawn to the attention of the district court and the Seventh Circuit, prior to being raised yet again in the petition for rehearing (pp.2-3) in appeal no. 94-3586. (Pet. pp.3-4,15,18,28) Cf. *Maryland v. United States*, 381 U.S. 41, 53, 14 L.Ed.2d 205, 206, 212-213, 85 S.Ct. 1293 (1965) (A question was "properly and timely raised" on appeal where it was raised in a petition for rehearing.).

It is likewise clear that the Seventh Circuit was made aware in 1991, again in 1993, and again in the petition for rehearing (pp.1-2) in appeal no. 94-3586 (Pet. p.1) of the fact that the Geschkes' case had been languishing without trial since 1979. (Pet. pp.21-23)

Thus, the defendants met those two questions throughout proceedings in the lower courts. Cf. *Sabbath v. United States*, 391 U.S. 585, 588, 20 L.Ed.2d 828, 830, 832, 88 S.Ct. 1755 (1968).

The Geschkes have not acknowledged anywhere in the petition that they "deliberately failed" to raise those questions.

Even assuming, for the sake of argument, that the two questions were not properly raised, "consideration of issues not present in the jurisdiction statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them." *Vance v. Terrazas*, 444 U.S. 252, 259, 62 L.Ed.2d 461, 464, 469, 100 S.Ct. 540 (1980) (citations omitted). "This Court has in the exercise of its discretion traditionally examined matters of importance not specifically assigned as error by the parties." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 48, 51 L.Ed.2d 124, 128, 157, 97 S.Ct. 926 (1977) (citations omitted).

This Court takes notice of a combination of grave errors even if those errors were not raised in the lower courts. *Rogers v. United States*, 422 U.S. 35, 41, 45 L.Ed.2d 1, 7, 95 S.Ct. 2091 (1975); *Washington Railroad Company v. Bradley*, 77 U.S. 299, 302-303, 19 L.Ed. 894, 895 (1870).

This Court "has the authority and the duty in exceptional circumstances to notice federal court errors to which no exception has been taken, when they `seriously affect the fairness, integrity or reputation of public judicial proceedings.'" *Connor v. Finch*, 431 U.S. 407, 421, 52 L.Ed.2d 465, 478, 97 S.Ct. 1828 (1977), citing *United States v. Atkinson*, 297 U.S. 157, 160, 80 L.Ed 555, 557, 56 S.Ct. 391 (1936).

Exceptional circumstances are those "Conditions which are out of the ordinary course of events; unusual or extraordinary circumstances." *Black's Law Dictionary*, 5th ed., pg. 290

(St. Paul, Minn.: West Publishing Company, 1979). It is unusual and extraordinary for the Geschkes' legal counsel to acknowledge that they had engaged in a clear conflict of interest by simultaneously working for defendants who were accused of fraud and RICO violations, among other counts. It is unusual and extraordinary for a trial court to fail to bring a case to trial for nearly fifteen years.

This Court's Rule 24(1)(a) states that "At its option, . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."

Plain error is "an error in court proceedings with such fundamental consequences that it must be corrected." David Mellinkoff, *Mellinkoff's Dictionary Of American Legal Usage*, pg.485 (St. Paul, Minn.: West Publishing Company, 1992).

This Court will review a matter not raised below that constitutes "plain error of such a fundamental nature that we should notice it." *Sibbach v. Wilson & Company, Inc.*, 312 U.S. 1, 16, 85 L.Ed. 479, 480, 486, 61 S.Ct. 422, rehearing denied 312 U.S. 713, 85 L.Ed. 1144 (1941) (citations omitted).

This Court has implicitly recognized a "fundamental error rule," having held that it will consider erroneous rulings essential to the foundation of an action. *Magruder v. Drury*, 235 U.S. 106, 113, 59 L.Ed. 151, 153-154, 35 S.Ct. 77 (1914) (citations omitted).

And the lower courts' complete disregard of that conflict of interest, interference with the Geschkes' representation by counsel, and extreme delay, constitutes fundamental error in that it is "Error of such character as to render judgment void." It is error that "will be considered on review, whether assigned as error or not, where the justice of the case seems to require

it." *Black's Law Dictionary*, 5th ed., pg. 487.

The case the defendants cite to support their waiver argument (Brief p.3) involves a petitioner's failure to raise in the court of appeals the issue of a district court's "abuse of discretion in denying costs under Rule 54(d)" which caused this Court to conclude that the issue "is not properly before us." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, 67 L.Ed.2d 287, 299, 101 S.Ct. 1146 (1981). That issue, unlike the conflict of interest and delay questions in the Geschkes' petition, did not involve plain, fundamental error.

In deciding to consider a question first raised in the petitioner's brief, this Court may take into consideration the fact that a petitioner has been proceeding pro se. *Pollard v. United States*, 352 U.S. 354, 359, 1 L.Ed.2d 393, 398, 77 S.Ct. 481 (1957) (This Court considered, as a significant factor in deciding to consider a question first raised in the petitioner's brief, the fact that the petitioner had not been represented by legal counsel in the court below and in his petition for certiorari).

The defendants hide behind unsupported technical objections to the first two questions in the Geschkes' petition without answering questions that beg to be answered: Did the defendants retain the Geschkes' counsel after counsel undertook to represent the Geschkes against them? And did the defendants continue to employ the Geschkes' legal counsel all during the time that counsel was representing the Geschkes in their case against the defendants?

The defendants ask this Court to agree that unheard-of delay, admitted attorney conflict of interest, and the defendants' flagrant interference with the Geschkes' representation by legal counsel are not drastic departures from the usual and accepted course of judicial proceedings.

Equally preposterous is the defendants' assertion that the

Geschkes failed to put before the district court any evidence of a conflict of interest or prejudice resulting therefrom. The Geschkes offered such evidence and the district court refused it. (Pet. pp.15,28)

The defendants' assertion (Brief p.3) that the Geschkes somehow caused the grotesque delay in this case is a bizarre inversion of facts showing that the district court failed to control the case and allowed the defendants to obstruct and delay its progress toward trial. That delay worked to the advantage of the defendants, while in the meantime the Geschkes aged from their late fifties to early seventies.

The "numerous continuance requests" that the defendants allege but fail to identify or specify (Brief p.3) were in reality never made.

Before their case finally went to trial, the Geschkes filed two petitions for writ of mandamus. In the fourteenth year of the case, in May 1993, the first such petition was filed, after a seventeen-month delay caused by the district court's granting the defendants' meritless motion for summary judgment in favor of the principal defendant, LaSalle National Bancorp, and after the Geschkes had complied with the court's order to inspect more than 135,000 documents the defendants produced and file a detailed record of the defendants' (non)-production of requested documents. The petition asked the Seventh Circuit to order presiding judge John F. Grady to take the case to trial; it was denied one week later. The second petition, filed in August 1993, sought Judge Grady's removal from the case and went up to this Court on petition for certiorari, which was denied in March 1994. The seven-month delay caused by those two petitions does not begin to compare with the seventeen-month delay caused by the summary judgment motion, or with the fifteen-year delay caused by the defendants and, by default, the district court.

The case record (see petition for rehearing, p.1, in appeal no. 94-3586) discloses that the Geschkes diligently attempted to bring their case to trial, with no assistance from the trial court and against obstruction by the defendants.

The defendants make a transparent attempt to sow confusion as to the third and fourth questions presented in the Geschkes' petition. Neither question asserts misapplication or misstatement of law, but rather alleges a thorough disregard of this Court's controlling decisions.

Nowhere does the petition challenge the district court's right to use special verdict forms. (Pet. p.27) The petition argues that the court abused its discretion by formulating and submitting jury instructions that were prejudicially inaccurate and incomplete, and therefore misleading, were at odds with decisions from this Court, and prevented the jury from rendering a fair and just verdict. The court further abused its discretion by entering judgment in favor of all the defendants after the jury found only in favor of three and on only six of the fifteen counts against them. (Pet. pp.23-27)

The petition argues that the court abused its discretion by excluding essential evidence that went to the heart of the Geschkes' case, thereby ignoring controlling decisions from this Court. (Pet. pp.27-28)

CONCLUSION

The facts and arguments in the petition for certiorari pose an underlying question: How bad must things get before courts of review will intervene? The gross miscarriage of justice that has taken place in the Geschkes' case merits this Court's exercise of its supervisory power over the federal judiciary system. The district court failed to discharge its responsibilities in the case, and thoroughly abused its discre-

tion. The Seventh Circuit condoned that failure and abuse, and itself disregarded the controlling decisions of this Court.

And the Seventh Circuit was not content to only hand down a decision that is factually at sea, misstates issues presented and fails to address those the Geschkes actually presented. That decision is probably unique in its contemptuous and insulting dismissal of hapless plaintiffs who sustained the hardship of a fifteen-year struggle to bring their meritorious case to trial.

The issues raised in the petition for writ of certiorari must persist until fairness and justice are attained in the case.

The petition for certiorari should be granted.

Respectfully submitted,

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